Supreme Court, U.S.
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No. 88-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERTRIBAL COUNCIL OF NEVADA, INC.,
Petitioner,

v.

DONALD HODEL, individually and as Secretary of the Interior of the United States of America, and THE STATE OF NEVADA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENT STATE OF NEVADA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Inter-Tribal Council of Nevada, Inc. ("the Council") or any of its member tribes were "former beneficial owners" with standing to seek the forfeiture of the conveyance of the Stewart Indian School site to the State of Nevada ("State") under 25 U.S.C. § 293a or review of the conveyance under the Administrative Procedure Act, 24 U.S.C. § 702?

2. Whether the Council has properly stated or otherwise shown it has standing to assert a claim under 25 U.S.C. § 443a?

LIST OF PARTIES

The Petitioner has adequately described the parties.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately described the Opinions Below, the jurisdiction of this Court, and the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

A. Nature of the Case.

The State agrees with the Council's statements with respect to the nature of this case but adds that in none of the Complaints filed by the Council is there a specific reference to a claim being asserted under 25 U.S.C. § 443a.

B. Summary of Proceedings Before the District Court.

The State agrees with most of the Council's statements with respect to the summary of the proceedings before the district court; however, the quotation from the district court's memorandum opinion and order entered on September 26, 1984, addressing the standing issue should be placed in the following context.

In its ruling on the respondents' motions to dismiss petitioner's second amended complaint, the district court

stated:

> At the hearing on the motion for a preliminary injunction the Court concluded that the plaintiff was not the "beneficial owner" and was not an "indian [sic] tribe" within the meaning of 25 U.S.C. § 293a. After further reflection the court believes this conclusion was probably erroneous and the plaintiff Inter-Tribal Council should be considered to be the appropriate representative of the Indian tribes, if any, deemed to be the beneficial owners of the Stewart Indian School property. Therefore, the plaintiff has standing to represent the rights of the Indians or Indian tribes in any litigation within the jurisdiction of this court. Great Lakes Inter-Tribal Council, Inc. v. Voight, 309 F.Supp. 60 (W.D.Wis. 1970)

Petitioner's Appendix C at 20a-21a. The district court then granted the motions to dismiss and granted petitioner leave to file an amended complaint naming the Secretary of the Interior and the State of Nevada as the sole parties defendant and stating a claim for relief under 25 U.S.C. § 293a.

The district court's memorandum opinion entered on March 10, 1987, Petitioner's Appendix D at 32a-33a, addressed its earlier comments on the issue of standing:

> Plaintiff lacks associational standing to petition for forfeiture because its members would not have standing to sue in their own right. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 342 (1977). The earlier order simply indicated that standing was plead adequately. Plaintiff failed to prove standing at trial.

C. Statement of Facts Relevant to the Issues.

The State agrees with most of the Council's statements with respect to its statement of facts relevant to the issues. In the interest of accuracy and completeness, however, the State adds the following facts.

The district court never specifically found as fact Petitioner's assertion that:

> [I]n September, 1981, in a meeting among representatives of the Nevada Indian tribes, the Nevada Congressional delegation and then Deputy Secretary Roy Sampsel, it was announced that as between the State of Nevada and the Nevada Indian tribes, the Stewart Indian School property would be awarded to whoever submitted the best adoptive use plan.

Petition for Writ of Certiorari at 9. This statement remains merely a contention of the Petitioner.

The Petitioner omits relevant details regarding the establishment in 1888 of the Stewart Indian School and the conveyance whereby the United States acquired title to the site. Title to the property was never held by the Indian School Commission created by the Act of January 25, 1887, 1887 Nev. Stat. ch. XII. Nor was title conveyed to the United States from the Commission in trust for the benefit of the school as required by section 8 of the Act. Title was conveyed to the United States by the

private, non-Indian owners in fee simple with no language creating a trust or beneficial interest in any other party or group.

The Petitioner also omits relevant details regarding the closure of the school in 1980. That action was the result of Congress' decision to cut off funding for the school after determining that it was unsafe and too expensive to repair. At that time, only 27 students of the approximately 400 who were attending the school were Nevada residents; the majority of the students were from Arizona and California. At the time of the conveyance of the property to the State in July of 1982, the Stewart Indian School had been closed for some two years.

SUMMARY OF ARGUMENT

The Stewart Indian School site was never set aside by treaty, statute or

conveyance as Indian land. There are no conflicting authorities on the issue of whether the site may properly be considered a "dependent Indian community" under 18 U.S.C. § 1151(b). The lower courts properly found that neither the Council nor its members were "former beneficial owners" of the site under 25 U.S.C. § 293a. The Council therefore lacks standing to challenge the transfer or seek review of an alleged violation of the Bureau of Indian Affairs Manual implementing the provisions of 25 U.S.C. § 293a.

The Council failed to plead or rely in district court on the provisions of 25 U.S.C. § 443a. In any event, the evidence clearly shows that the site was not set aside for the administration of the Council's affairs.

REASONS FOR DENYING THE PETITION

I. There is no conflict of authority as to whether the Council or any of its members are former beneficial owners under 25 U.S.C. § 293a.

The Council urges this Court to grant certiorari because of a purported conflict between the courts' rulings in United States v. Meyers, 202 F.2d 387 (8th Cir. 1913), cited by the district court in support of its conclusion that attendance by individual Indians at the school did not convert the site to Indian country, and C.M.G. v. State, 594 P.2d 798 (Okla. 1979). In C.M.G., the court concluded that an Indian school located on land specifically reserved for "the settlement of friendly Indians" was Indian country in which the State of Oklahoma had no criminal jurisdiction. The court found no conflict and believed Meyers to be distinguishable on its facts.

In C.M.G., the court noted that, while it was used as an Indian school, the land in Meyers had not been reserved for the use of Indians when it was acquired by the United States. C.M.G., 594 P.2d at 801-802. Rather, the site had been reserved to benefit the territory and future state of Oklahoma. Meyers, 206 F.2d at 392.

In addition to the fact that neither case discussed the existence of an "implied trust," the present case is closer to the facts of Meyers. The Council concedes that no express trust was created in favor of the Council, its members, or any other group of Indians. The United States received title in fee simple directly from non-Indian owners. Despite the Council's assertions to the contrary, the conveyance was not made in accordance with the old Nevada statute, Act of January 25, 1887, 1887 Nev. Stat.

ch. XII, creating the Indian School Commission, because title was never acquired or held, in trust or otherwise, by the Commission.

Even if a trust had been implied by virtue of the Nevada statute, it did not contemplate a trust for the benefit of the Council, or a particular Nevada tribe, or the Nevada Indian population in general. If the title had been held by the Indian School Commission, it would have been held for the benefit of the school, not the Council or any of its members.

The Council's argument with respect to the definition of "Indian Country" is misplaced. The lower courts did not refuse to address this issue but rather concluded that, based upon the circumstances, the Council could not be considered the "former beneficial owner" of the site under 25 U.S.C. § 293a. The

record simply does not support the conclusion that the site had been validly set aside for any Indian or Indian tribe represented by the Council.

Cases cited by the Council for the proposition that Indian country need not inure to the benefit of a single tribe or named tribe do not address the definition of "former beneficial owner" under 25 U.S.C. § 293a. A finding that the school was Indian country for purposes of criminal jurisdiction would not compel the conclusion that the Council or its members were former beneficial owners of the site. In addition to the fact that the government never expressly held the site in trust for the Council or its members, several additional circumstances exist which negate such an intention. In 1980, Congress unequivocally expressed its intention to relinquish whatever role it had previously played with respect to

the operation of the Stewart Indian School by terminating all funding. At that time, only 27 of the approximately 400 students attending resided in Nevada. Even if Nevada Indians, whose children represented only 6.75% of the school's population, could in 1980 properly be considered the sole beneficiaries of any trust established for the benefit of the school, such a claim could not be made some two years later when the site was conveyed to the State of Nevada because it was then no longer dedicated for or used as an Indian school. The mere presence of a group of Indians in a particular area does not establish a dependent Indian community under 18 U.S.C. § 1151. State v. Cutnose, 532 P.2d 896, 898 (N.M. 1974); see also Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980).

II. The Council has not asserted or otherwise shown it has standing to assert a claim for relief under 25 U.S.C. § 443a.

The Council's belated attempt to argue the application of 25 U.S.C. § 443a should fail simply because it never attempted to state a claim for relief under this provision in any of its complaints or to pursue any available administrative remedies. Inter-Tribal Council of Nevada, Inc. v. Hodel, 856 F.2d 1344, 1348, 1352 n.1 (9th Cir. 1988). The Council improperly attempted to supplement the record on appeal before the Court of Appeals with respect to this issue and clearly had not relied on this ground in the district court.

Moreover, it is difficult to understand the Council's position that the Indian School site had been "reserved for the administration of its affairs" under § 443a when its argument with respect to

25 U.S.C. § 293a relies upon the site's purported dedication and use as an Indian school.

The Council fails to explain how the possible use of only one building for administrative purposes out of the many in the school complex could change the character of the site as a whole. The Court of Appeals found, and the record clearly supports the conclusion, that the Stewart School site was never set aside by treaty or statute as Indian land. The land was purchased for use as a school serving students from all over the western United States, primarily Arizona and California. Whatever the use permitted for one building, the site was not reserved for the administration of the affairs of the Council's members and the Council therefore has no standing under § 443a to protest the transfer of the land to the State of Nevada.

III. The Council has no standing under the Administrative Procedure Act to request review of the alleged violation of the Bureau of Indian Affairs Manual.

The portion of the Bureau of Indian Affairs Manual allegedly violated by the Secretary of the Interior in its transfer of the school site to the State of Nevada implements the provisions of 25 U.S.C. § 293a. Since the Council has failed to show standing to challenge the transfer under § 293a, it similarly cannot show that any violation of the Bureau of Indian Affairs Manual resulted in any injury in fact to its interests for which it would have standing to seek review under the Administrative Procedure Act.

In addition, even if the Council could show standing, a question remains as to whether it would be barred from judicial relief for failure to exhaust administrative remedies. Neither the complaint nor the briefs represent that

the Council made any attempt to seek administrative review of the transfer decision or procedures of the Bureau of Indian Affairs, or that a procedure for such review was unavailable. Inter-Tribal Council of Nevada, Inc. v. Hodel, 856 F.2d 1344, 1352 n.1 (9th Cir. 1988).

CONCLUSION

The Stewart Indian School site was never set aside by treaty, statute or conveyance as Indian land. A trust in which the Council or its members are sole beneficiaries cannot be implied under the circumstances of this case, where only a small percentage of the Council's members attended the school which was permanently closed in 1980, some two years prior to the challenged transfer. Since neither the Council nor its members are former beneficial owners, it has no standing to seek a forfeiture of the transfer under 25 U.S.C. § 293a, or judicial review of

an alleged violation of the Bureau of Indian Affairs Manual under the Administrative Procedure Act.

Since the Council failed to allege a claim under 25 U.S.C. § 443a in its complaint, it should not be permitted to raise the issue for the first time on appeal. In any event, the evidence demonstrates that the school site was not reserved for the administration of the Council's or its members' affairs. The Council therefore lacks standing to assert a claim under 25 U.S.C. § 443a.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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